(2)

No. 90-943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOE CLARK,

Petitioner,

v.

WESTERN UNION TELEGRAPH COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals, in an *unpublished* opinion, correctly held that Title VII's statute of limitations is not equitably tolled when the Plaintiff, through his own lack of diligence, did not file his Title VII action until ten months after the EEOC Notice of Right To Sue was delivered to his post office box, at a time when Plaintiff's state law employment discrimination action was on remand to the state agency for reconsideration of back-pay, after review by the state circuit and appellate courts at Plaintiff's request.

PARTIES

Respondent, The Western Union Corporation, and sued as Western Union Telegraph Company, is a corporation with no parent corporation and no subsidiaries (except wholly owned subsidiaries), and thus there are no other entities required to be identified under Rule 29.1.

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Respondent, The Western Union Corporation, sued as Western Union Telegraph Company, ("Western Union") submits this brief in opposition to the petition for writ of certiorari by Joe Clark ("Clark").

OPINIONS BELOW

The opinion of the Court of Appeals and the decision and order of the United States District Court for the Northern District of Illinois have not been published in any official reporter. The unpublished order of the Court of Appeals is reproduced in the Petition. (Pet. App. 1-7).

JURISDICTION

The jurisdictional requisites are as set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. Sec. 2000e-5(f)(1), which, in pertinent part, provides as follows:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

STATEMENT OF THE CASE

Joe Clark brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, against his former employer, Western Union, after he was demoted from his position as sales representative in 1978. Clark initially filed a charge of racial discrimination with what is now the Illinois Human Rights Commission (HRC). He cross-filed the same charge with the Equal Employment Opportunity Commission (EEOC); the EEOC deferred acting on his charge until the HRC issued its final disposition. In 1983 the HRC affirmed the findings and recommendations of an administrative law judge that Western Union discriminated against Clark on the basis of his race by demoting him, and that Clark be reinstated and awarded back pay and benefits. *See Clark v. Western Union Telegraph Company*, 10 Ill. HRC 316; 8 Ill. HRC 100. Dissatisfied with the HRC's back pay formula, Clark sought administrative review in the circuit court of Cook County, Illinois. In 1984 the circuit court affirmed the HRC's decision as to back pay, and a judgment for back pay and attorneys fees of $71,711.45 was paid and satisfied by Western Union. Clark appealed to the appellate court. In 1986 the appellate court reversed, holding that the HRC abused its discretion in calculating the back pay award, and remanded the case to the HRC for reconsideration. *See Clark v. The Human Rights Commission*, 141 Ill. App. 3d 178 (1st Dist. 1986). Clark filed a Petition for Leave to Appeal in the Illinois Supreme Court, which was denied on October 2, 1986.

During the pendency of Clark's case on remand before the HRC, the EEOC, on November 30, 1987, determined that it had no jurisdiction over Clark's discrimination charge

pursuant to the Supreme Court's decision in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). The EEOC accordingly sent Clark by certified mail a notice of his right-to-sue which stated that Clark had ninety days from the date of receipt of the notice to seek judicial review of the EEOC's determination. On December 14, 1987, the right-to-sue letter was delivered to the post box designated by Clark as his mailing address. Clark shared the box with a woman named Rosie Inwang whom he authorized to accept his mail. On December 29, 1987, the letter was returned to the EEOC after it had remained "unclaimed" for two weeks.

On October 11, 1988, Clark and his attorney visited the Chicago office of the EEOC to inquire about the status of Clark's case. They were informed that the right-to-sue letter had been issued and returned "unclaimed" to the EEOC. A copy of the original right-to-sue letter was given to Clark. Thirteen days later, on October 24, 1988, Clark filed the instant action. The same day, Clark moved the HRC to dismiss his case, with prejudice. The HRC granted the motion on October 28, 1988. Western Union filed an answer to Clark's Title VII action pleading the ninety day time limit under 42 U.S.C. § 2000e-5(f)(1) as an affirmative defense. Alerted to the issue, the district judge, *sua sponte*, issued an order directing the parties to present factual and legal submissions on the issue. He thereafter conducted hearings before he dismissed Clark's action on December 8, 1988. He concluded that Clark's failure to pick up his mail was controlled by the Seventh Circuit's decision in *St. Louis v. Alverno College*, 744 F.2d 1314 (7th Cir. 1984) and that the action was time-barred because Clark filed it more than ten months after the EEOC sent the right-to-sue letter to his post office box. *See* Western Union App. 1-4. The decision was affirmed by the

United States Court of Appeals for the Seventh Circuit in an unpublished order dated September 12, 1990, in which it rejected Clark's plea for equitable tolling of the ninety day time limit on the facts of this case. *See* Pet. App. 1-6.

SUMMARY OF ARGUMENT

This case plainly presents no question calling for this Court's review. Petitioner (Clark) does not even allege a conflict among the circuits. And the decision below, which is unpublished and therefore of no precedential value, is correct and entirely consistent with the decisions cited by Petitioner, including *Yellow Freight System v. Donnelly*, 110 S.Ct. 1566 (1990).

Not one of the decisions of this Court relied on by Petitioner even deals with equitable tolling of the Title VII ninety day time limit. This court did speak to the issue in *Baldwin County Welcome Center v. Brown*, where it said that "one who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." 466 U.S. 147 at 151, 152, 104 S.Ct. 1723, 1726 (1984). Here Clark's actions in failing to pick up the Notice of Right to Sue at his post office box are patently lacking in diligence.

Petitioner also complains that the decision below conflicts with the Seventh Circuit's own decision in *Donnelly*. But an intra-circuit conflict would not warrant this Court's review, and in any event, the Seventh Circuit perceived no conflict, and there is none.

Clark's Title VII action was an untimely attempt to relitigate in federal court a claim that was adjudicated and reviewed by the Illinois Human Rights Commission and state courts over the preceding ten years. Equitable tolling does not apply.

REASONS FOR DENYING THE WRIT

A. The *Clark* Decision Does Not Conflict With *Donnelly*.

The Supreme Court's decision in *Yellow Freight System, Inc. v. Donnelly*, 110 S.Ct. 1566 (1990) established that state courts have *concurrent* authority with federal courts to adjudicate civil actions under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* (1982 ed.). Contrary to Clark's implied contention, this Court's decision in *Donnelly* did not address the question of when equitable principles may be invoked to excuse failure to bring a Title VII action within 90 days after the issuance of a right-to-sue letter, as required under 42 U.S.C. § 2000e-5(f)(1).

Clark also contends that the Seventh Circuit's decision in his case conflicts with its own earlier decision in *Donnelly*. This Court should not exercise its discretionary jurisdiction to resolve an alleged conflict in legal principles arising out of two decisions in the same circuit. Clark did not seek a rehearing *en banc* by the Seventh Circuit to reconcile the alleged conflict, although that is the appropriate procedure. *See* Rule 35, F.R.A.P. and Rule 40(c), Seventh Circuit Court of Appeals Rules, 28 U.S.C.A.

Further, as the Seventh Circuit's opinion in the *Clark* case clearly points out, its decision in *Donnelly v. Yellow*

Freight System, Inc., 874 F.2d 402 (7th Cir. 1989) is not analogous to Clark's situation. *See* Pet. App. 5-6. In *Donnelly* the Plaintiff received the EEOC Notice of Right-to-Sue about 15 days after she filed her charge with the EEOC, and she filed suit in state court claiming state law violations within ninety days of receiving the EEOC right to sue letter. A subsequent amendment to her complaint re-stating her charges under Title VII was held to relate back to the time of filing the complaint. Here, by contrast, Clark did not amend his state court complaint; he filed a new action in federal court ten months after his EEOC Notice of Right to Sue was returned "unclaimed" from his post office box. Also, unlike the Plaintiff in *Donnelly*, Clark was seeking simply to change courts to escape a ruling that left him dissatisfied on an issue—back pay—that was fully within the state courts' authority.

With respect to equitable tolling of the ninety day time limit, the Seventh Circuit in the *Clark* opinion reaffirmed its earlier holding in *Jones v. Madison Service Corp.*, 744 F.2d 1309, 1314 (7th Cir. 1984) that equitable tolling is to be restricted and reserved only for situations in which the claimant has made a good faith error or has been prevented in some extraordinary way from filing his complaint in time. Clark's neglect, resulting in an untimely Title VII filing, does not constitute a good faith error.

Clark argues that his fault in failing to claim his right to sue letter (which he does not dispute in his Petition) and file his Title VII action within ninety days is irrelevant in light of *Donnelly*. We disagree. The fact that state courts have concurrent jurisdiction with federal courts to adjudicate Title VII actions is unrelated to the statutory requirement that the action be timely filed. The EEOC was correct in issuing a Notice of Right to Sue based upon *Kremer v. Chemical Construction Corp.*, 456 U.S.

461 (1982) because back pay calculations under Clark's state law action had been fully reviewed and then remanded to the HRC by the state courts. And in any event, Clark was required to file his Title VII action within the statutory time limit.

B. The *Clark* Decision Is Consistent With Supreme Court Precedent.

On the equitable tolling issue, this Court has said that "one who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence," and "strict adherence to the procedural requirements specified by the legislature is the best guarantee of even handed administration of the law." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 at 151, 152, 104 S.Ct. 1723, 1726 (1984). This Court's decision in *Donnelly* that state courts have concurrent jurisdiction with federal courts to adjudicate Title VII actions does not alter the *Baldwin County* principles. Indeed, if Title VII actions can be brought in either state or federal court there is less reason to excuse untimely filings.

Contrary to Clark's contentions, this Court's decisions in *New York Gaslight Club, Inc v. Carey*, 447 U.S. 54 (1980) and *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) are not in conflict with the Seventh Circuit's order in *Clark*. Neither case involves questions of equitable tolling of Title VII's ninety day time limit. *Alexander* held that an arbitral award did not have preclusive effect in a Title VII action. Clark's implicit argument that the ninety day time limit should be disregarded when a complainant needs to go into federal court to "supplement" state court remedies not only has no support in any court decision on the issue, but also misconstrues *New York Gaslight Club* as to the circumstances when supplemental relief in federal court is available.

To illustrate what is meant by "supplemental," this Court in *New York Gaslight Club* stated:

> For example, if state proceedings result in an injunction in the favor of the complainant, but no award for back-pay because state law does not authorize it, the complainant may proceed in federal court to "supplement" the state remedy. The state law which fails to authorize back-pay has not been pre-empted. 447 U.S. at 68.

In his Title VII Complaint, Clark sought back-pay, reinstatement and attorney's fees—the same type of relief that the HRC granted in its January, 1983 Order in the *Clark* case. Thus, there can be no doubt that Clark's Title VII suit seeks the same remedies that were litigated and reviewed in the state court system and is not a request for "supplemental" remedies.

Furthermore, Clark ignores other recent decisions of this Court in broadly arguing that "deferral to state proceedings will be frustrated if the ninety day statute of limitations is not tolled during the time Title VII cases are pending before state courts and administrative agencies." (Petition, p. 8). For this proposition he cites *Unger v. Consolidated Foods Corporation*, 657 F.2d 909 (7th Cir. 1981), but fails to note that this Court vacated and remanded the case to the Seventh Circuit for reconsideration in light of *Kremer v. Chemical Construction Co.*, 456 U.S. 461 (1982). *See Consolidated Foods Corporation v. Unger*, 456 U.S. 1002, 102 S.Ct. 2288 (1982). The Seventh Circuit then applied the preclusion principles of *Kremer* to bar plaintiff relief in federal court because she had obtained state court review of state administrative determinations as to unlawful discrimination under state law, before filing her Title VII suit in federal court. *Unger v. Consolidated Foods Corporation*, 693 F.2d 703 (7th Cir. 1982), cert. den. 460 U.S. 1102 (1983).

C. The Unpublished Seventh Circuit Opinion In *Clark* Does Not Present A Question Of General Importance.

Clark argues that the Seventh Circuit's decision in his case "will encourage the lower federal courts to disregard decided Supreme Court decisions: *Donnelly*, *Carey* and *Gardner-Denver*." (Petition, p. 10). However, the *Clark* decision is in the form of an unpublished order, which, according to Seventh Circuit Rule 53(b)(2)(iv), shall not be cited in any federal court within the circuit. Rule 53(c) further provides, in part, for published opinions when the decision (i) establishes a new, or changes an existing rule of law; (ii) involves an issue of continuing public interest; (iii) criticizes or questions existing law; (iv) constitutes a significant and non-duplicative contribution to legal literature . . . (C) by resolving or creating a conflict in the law. *See* Rule 53, Seventh Circuit Court of Appeals Rules, 28 U.S.C.A.

Thus, practitioners and courts in the Seventh Circuit cannot cite the *Clark* order as precedent. Further, since the Seventh Circuit Rules provide that any decision creating a conflict in the law or establishing a new or changed rule of law should be published, obviously the Seventh Circuit does not view the *Clark* decision as involving any new or important question. The unpublished Seventh Circuit order is based on an appeal from a district court decision that is also unpublished, so it is difficult to see how lower federal courts inside or outside of the Seventh Circuit will be influenced by the *Clark* decision.

Finally, Clark fails to identify in his Petition any conflict between the Seventh Circuit's decision in *Clark* and the decisions of other United States courts of appeal. As previously noted, the Supreme Court decisions in *Donnelly*, *Carey* and *Gardner-Denver* do not address the ques-

tion of when equitable tolling should apply, so the *Clark* decision is not in conflict with them. Thus Clark's petition fails to present a question of general importance for consideration by this court.

CONCLUSION

For the foregoing reasons, further review by this Court is not warranted; and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

[1]* IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOE CLARK,

Plaintiff,

vs.

WESTERN UNION TELEGRAPH COMPANY,

Defendant.

Docket No. 88 C 8979

Chicago, Illinois
December 8, 1988—9:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE MILTON I. SHADUR, Judge

APPEARANCES:

For the Plaintiff:
MR. P. SCOTT NEVILLE, JR.

For the Defendant:
MR. ROY SEARS and
MR. JON JACOBSON

* * * * * *

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* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

[2] THE CLERK: Case No. 88 C 8979, Joe Clark vs. Western Union Telegraph Company, status.

MR. NEVILLE: Good morning, your Honor. For the record P. Scott Neville, N-e-v-i-l-l-e, appearing on behalf of the plaintiff, Mr. Joe Clark.

MR. SEARS: Roy Sears and Jon Jacobson for the defendant Western Union Telegraph Company.

THE COURT: Well, counsel, I have read all of the submissions here, including the one that was just tendered yesterday in the form of a reply to this motion for an evidentiary hearing.

What I perceive here is that we have really an unfortunate situation, in which we have a plaintiff with an established claim for liability on the part of a defendant, but as to whom, for better or worse, a decision about a course of action was taken that under the circumstances results (for the reasons I will be getting into in a minute) in the barring of the federal claim.

Now that's always a regrettable situation, but in that sense it is no different from the situation in which somebody has a dead-bang claim for personal injury or on a note or anything else, and lets the limitation period go by. There are reasons that the law establishes time periods for the taking of action. Those reasons have to do with repose and with peace, and it's not for courts to interfere with those [3] because of the fact that the party may have—either a clear claim or a sympathetic position, or both.

Now what we have here, as I have looked at these materials and going down the issues, Mr. Neville, in the sequence in which you set them up in your first memorandum by paragraphs: Paragraph 2(A), whether or not EEOC

followed what is called regular custom and practice, is really totally irrelevant. One other point, by the way, in that—that is, in your reply, your memorandum inaccurately characterizes Mr. Clark's 1984 letter as a request for a right to sue, and in that way seeks to deflect the fault to EEOC. That's simply not a fair reading of the letter, and I think anybody who looks at it would come to that conclusion. But that too is entirely irrelevant. Here the clock didn't start running in 1984, and there is no contention of that. The issue is whether it started in 1987 when a right to sue letter was in fact issued. For that purpose this characterization, which is a mischaracterization, is a red herring.

If we had any kind of close question of timing as to when the 90 days started after the mailing date of the right to sue letter, inquiry of the kind that you've identified on EEOC custom and practice might bear examination, but here that is not so. It's certainly been established beyond a question that notice was delivered to Post Office Box 49541 during December '87.

[4] Similarly, when we get to paragraph 2(B), whether or not the United States Post Office followed its internal regulation is equally irrelevant. On that score, of course, Western Union has sat [sic] out that there is another regulation that deals with transmittal to post office boxes rather than to individuals, but I really don't have to get into that one for just the same reasons that I have explained.

Here is a case in which the notice sticker that is attached reflects a 15-day interval between December 14th and December 29th before the thing was returned to the sender—that is, EEOC. But again the only relevant fact is that the notice was left, in the first instance, with Post Office Box 49541, and that's really the controlling issue for starting the limitations clock.

The third item, 2(C), which is the bulk sender business, is (if that were possible) even less relevant, if indeed it applies at all. You know, I suppose the sensible reading of that one is probably that if somebody sends three or more at a time, they have to fill out that form, not if they are somebody who may send three or more over some extended period. Otherwise I wouldn't understand what the form is for. But there is nothing to suggest that EEOC sent out three or more notices at the same time it transmitted this one. But it's a false issue.

And finally on paragraph 2(D), that one about [5] establishing that the information is inaccurate because of the disparity between the December 29th and January 20th, once again just doesn't have any bearing on the unquestioned fact that what we had here was a delivery.

All of this comes down to an effort to obscure what is material to this lawsuit. And that is first, the sending of the letter to the address that Mr. Clark had designated, on which he was still the registered owner at the time that it was sent, and second, Mr. Clark's failure by his own choice to handle himself his own pickup of mail from the post office box. Accordingly I find that there is no predicate for an evidentiary hearing, because all of the matters that you have addressed are nonmaterial in legal terms. And that being true, as I indicated when you were here the last time before this flurry of added papers got started, the case is controlled by our Court of Appeals decision St. Louis against Alverno College, and I'm dismissing the claim—the action—as untimely filed.

So the final order is not going to be a written one other than dismissal. The reasons that I have just stated serve as a statement of reasons for that determination, and the action is dismissed.

Thank you.

MR. SEARS: Thank you, Judge.

MR. NEVILLE: Thank you.

[6] (WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

[Certificate of Court Reporter omitted in printing.]